

# 6 Elegant Scholastic Humanism? Arias Piñel's (1515–1563) Critical Revision of *Laesio Enormis*

Wim Decock

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## A. INTRODUCTION

It is increasingly being recognised that broad tags such as “humanism” and “scholasticism” fail to do justice to the “hybrid” nature of legal as well as theological sources of the early modern period, certainly in the Iberian world.<sup>1</sup> A case in point are the *Commentarii ad rubricam et legem 2, C. de rescindenda venditione* by the Portuguese jurist Arias Piñel, a successful legal practitioner born in Sesimbra who combined his lawyering activities with a position at the University of Coimbra and later at Salamanca. By submitting C.4.44.2 to thorough philological and historical analysis, Piñel

<sup>1</sup> This contribution draws on material previously published in W Decock, *Theologians and contract law, The moral transformation of the ius commune (c. 1500–1650)* (2013) 566–589.

wanted to investigate the “true” meaning of *laesio enormis*. Against the gloss and the *communis opinio doctorum*, he claimed that the remedy by virtue of C.4.44.2 was unknown to the Roman jurists before the time of Emperors Diocletian and Maximian. In Piñel’s view, the irrelevance of lesion to pristine Roman law was obvious from a careful exegesis of various texts in the Digest. Although he expressed the fear that many scholars would bear the “new light of truth” on *laesio enormis* badly, Piñel went further in his critique of traditional legal scholarship by revealing the medieval origins of the allegedly Roman doctrine of objective deceit (*dolus reipsa*) – which was traditionally associated with the teachings on lesion. The mission of the jurist from Sesimbra was to combat anachronistic readings of the Roman sources. He believed that the French humanists did not go far enough in their exercise of contextualising the Roman legal tradition. Piñel wanted to highlight the fundamental difference between the pagan legal culture that had informed the classical Roman jurists, on the one hand, and the new mentality of the *ius commune* as it developed during the Christian Middle Ages, on the other. Having said that, his thinking remained heavily imbued with Christian values. For his defence of justice in exchange he drew heavily on the scholastic theologians. Moreover, his style of writing sometimes recalls that of the Spanish canonist and theologian Martin de Azpilcueta, one of his former teachers. Eventually, Piñel became an authority himself for “elegant scholastic humanists” such as the Spanish canonist Diego de Covarruvias y Leyva.

## B. THE CAREER AND CONVICTIONS OF A HUMANIST JURIST<sup>2</sup>

### (1) Combining erudition with practical engagement

In the 1582 edition of the *Corpus iuris canonici*, commissioned by Pope Gregory XIII, the *correctores Romani* refer to Arias Piñel for further discussion on *laesio enormis*.<sup>3</sup> Arias Piñel (1515–1563) was a humanist jurist from Sesimbra near Lisbon. He ranks among those exceptional Renaissance men who continue to appeal to the modern reader both through depth of knowl-

<sup>2</sup> For Piñel’s biography this article relies on the excellent monograph written by J García Sánchez, *Arias Piñel, Catedrático de Leyes en Coimbra y Salamanca durante el siglo XVI, La rescisión de la compraventa por “laesio enormis”* (2004) 39–143, reviewed by T Wallinga in (2006) 74 *Tijdschrift voor Rechtsgeschiedenis* 185–187.

<sup>3</sup> Cf nota *Vide l.2 ad X 3,17,3* (canon *Quum dilecti*) in *Corpus Iuris Canonici* (1582) part 2, col 1123.

edge and liveliness of personality. Piñel appears to have been a successful jurist in his own day. A popular law professor, first at Coimbra (1539–1548 /1556–1559) and later at Salamanca (1559–1563), Piñel alternated legal scholarship with prestigious lawyering activities, serving, for example, as an advocate at the *Casa de Supplicación* in Lisbon.

In light of his own career, it should not come as a surprise that Piñel cites the famous statement that “law schools have the laws shoved down your throat, while the courts make you digest them, since practice is the science of digestion”. This expression can be traced back at least to Baldus de Ubaldis (1327–1400),<sup>4</sup> but it became particularly popular in the early modern period. For example, Joost De Damhouder (1507–1581), one of the Low Countries’ most influential jurists ever, rebuked those young ambitious lawyers who pleaded before the Council of Flanders or the Great Council of Malines without any knowledge about how those courts worked in practice.<sup>5</sup> In Piñel’s own experience, lawyering without a solid theoretical basis is dangerous, but legal scholarship without practical application is ineffective.<sup>6</sup> From classical literature he claims further proof for this insight, citing Pliny the Elder’s words that “the real battle takes place on the *forum*, the school is but a harmless kind of thing”.

However, if the tremendous erudition displayed by Piñel is anything to go by, for instance in his very praise of legal practice, then we must conclude from this that the humanist ideal which he ultimately aspired to in his life can hardly be attained without some degree of academic learning. In this regard, Piñel’s way of thinking is reminiscent of that of the famous Spanish canonist Diego de Covarruvias y Leyva (1512–1577). Covarruvias, too, combined a remarkable passion for humanist learning with a high sensitivity

4 Baldus, *In primam Digesti veteris partem commentaria*, ad D.4.4.38, f 256v, num 35: “Leges in scholis diglutiuntur, in palaciis digeruntur, quia practica est scientia digestiva.”

5 J de Damhouder, *Praxis rerum civilium* (1567) cap 96, 182, nr 2: “Nam quamvis saepenumero tales iuvenes sint docti et iurisprudentia plurimum valeant, stylum tamen fori, experientiam, et praxim nondum sunt consecuti, ac procedendi modum non satis tenent, quem quotidiana observatione et usu paulatim tandem assequuntur.” On Damhouder, see R Feenstra, “Damhouder”, in M Stolleis (ed), *Juristen. Ein biographisches Lexikon. Von der Antike bis zum 20. Jahrhundert* (1995) 152–153. For his seminal contributions to criminal law, see J Monballyu, “La théorie sur la sorcellerie chez Wielant et Damhouder”, in F Stevens and D van den Auweele (eds), *Houd voet bij stuk, Xenia iuris historiae G Van Dievoet oblata* (1990) 291.

6 A Piñel, *Commentarii ad rub. et l. 2, C. de rescindenda venditione, cum annotationibus Emanuelis Soares a Ribiera. Accessit eiusdem argumenti cap. 3 et 4, lib. 2 resolutionum Didaci Covarruviae* (1618), ad l2, part 2, cap 4, num 2, 152: “Ego autem post longam legendi professionem, postque diligentissimam foro navatam operam, in ea sententia sum, ut theorica sine praxi digestam solidamque iuris cognitionem praestare nequeat, praxisque absque theorica maxime periculosa et manca evadat.”

for legal practice. His learned and often highly sophisticated commentaries on the *ius commune* were interspersed with quite personal reflections on legal practice, passionate notes on textual criticism and brilliant quotes from ancient literary sources.

It is this combination of a passion for learning with a remarkable record of practical experience – a combination that is typical of many so-called “humanist jurists” – that we are going to discover as we analyse Piñel’s commentary on the *lex secunda*, that is the second provision of title 44 (*De rescindenda venditione*, on rescission of sale contracts) of the fourth book of the Code. C.4.44.2 famously states that if you or your father have sold a piece of land for a price considerably below its value, it is only human that you either repay the price and get back your land, or that you receive the surplus value, depending on the will of the buyer.<sup>7</sup>

Piñel insists on the necessity of examining the historical and philosophical roots from which the famous *Lex secunda* originated before trying to explain its true meaning. “The arts, like trees, cannot reach high if they are cut off from their roots.”<sup>8</sup> In the footsteps of Marcus Tullius Cicero, Piñel was convinced that humanist erudition and a true sense of historical criticism were not just qualities that boost the reputation of a lawyer. They were crucial to the fruitful interpretation of the sacred texts of law in a continuously changing context.<sup>9</sup> A full exploration of Piñel’s exposition lies beyond the scope of this chapter.<sup>10</sup> Yet it is worthwhile dwelling for a moment on the following points: his praise of private property and the prohibition against harming fellow human beings.

## (2) Praise of the individual against political absolutism

Piñel starts out with a seemingly theoretical investigation on the origin of the sale-purchase contract. It leads him into vast discussions with the Bartolists and the French humanists on subjects that seem to be rather exotic at first

7 For further explanation and literature on the subject, please allow me to refer to Decock, *Theologians and contract law* (n 1) 529–535.

8 Piñel, *Commentarii* (n 6), ad rubr, part 1, cap 1, 1–2pr: “Artium enim, sicut arborum, altitudo sine radicibus esse non potest, iuxta Ciceronis sententiam.” The original expression is slightly different, cf Cicero, *Orator*, 43, 147, in: *Cicéron, L’orateur, Du meilleur genre d’orateurs, Texte établi et traduit par Albert Yon* [Collection des Universités de France] (1964) 53: “Nam omnium magnarum artium sicut arborum altitudo nos delectat, radices stirpesque non item; sed esse illa sine his non potest.”

9 See Piñel, *Commentarii* (n 6) 1–65 (65 is wrongly indicated as 63 in the Antwerp 1618 edition).

10 For a more extensive overview of the contents of Piñel’s commentary on both the *rubrica* and the *Lex secunda*, see García Sánchez, *Arias Piñel* (n 2) 201–234.

sight, such as the existence or not of money in the time of the Trojan War. He concludes – in line with traditional teaching – that *emptio venditio* falls under the *ius gentium*. Yet, importantly, Piñel explains why jurists throughout the ages have considered this to be a question worthy of so much debate:<sup>11</sup> “they say that this investigation is useful, because the prince can abolish more easily what falls under the *ius civile* than what falls under *ius naturale*, that is the *ius gentium*”.<sup>12</sup> Piñel tries to argue, in this respect, that *ius gentium* and *ius naturale* are synonyms.<sup>13</sup> He cites the Lutheran jurist Johann Oldendorp (c1487–1567) to bolster this opinion, although this reference is probably a little bit dishonest, since Oldendorp was anxious to stress the differences between *ius gentium* and *ius naturale*.<sup>14</sup> If any, the theoretical difference between natural law and the law of nations resides in the fact that natural law is shared by animals and human beings alike (D.1.1.1–3). So, properly speaking, *ius gentium* and *ius naturale* are only equivalents if *ius naturale* is understood as the *ius naturale* that is proper to the human race.

In any event, Piñel eventually maintains that these distinctions between different types of law are actually superfluous, since all kinds of *ius* must be protected against interference by the prince. Piñel goes to great lengths to combat political absolutism (*absoluta potestas*). In his view, the first kind of harm (*laesio*) that can be done to the citizens is the infringement of their rights by the prince. Moreover, Piñel holds that the prince not only has no right to violate rights that are derived from the *ius gentium*. The prince should in fact never be allowed to violate any transfer of property between citizens, even if their agreement fell under the *ius civile*.<sup>15</sup> Consequently, the traditional distinction between rights deriving from *ius gentium* and rights based on *ius civile* is largely superseded, Piñel claims.

Mainstream political thought, which defends absolute power, is to be

11 Piñel, *Commentarii* (n 6), ad rubr, part 1, cap 1, num 31, 9: “Dicunt enim esse utilem eam inspectionem, quia princeps facilius tollere potest, quae sunt iuris civilis, quam ea, quae sunt iuris naturalis vel gentium.”

12 For further explanation, see K Pennington, *The prince and the law (1200–1600), Sovereignty and rights in the Western legal tradition* (1993).

13 Piñel, *Commentarii* (n 6), ad rubr, part 1, cap 1, num 18–19, 6.

14 J Oldendorp, *Variae lectiones ad iuris civilis interpretationem* (1546) 16: “Quare cum audis hanc vocem, Ius gentium, non semper exaudiendum est Ius naturale, sed plerumque Ius humanum, ut Livius recte appellat. Neque enim sequitur: Gentes id constituerunt, aut in usum admiserunt: Ergo est ius naturale aut aequum. Imo, saepe iniquissimum est.”

15 Piñel, *Commentarii* (n 6) ad rubr, part 1, cap 2, num 1, 10: “Demus enim aliquid acquisitum iure civili, prout ex stipulatione vel alia conventionem vel obligationem ex iis quas scribentes dicunt esse iuris civilis, per d. l. ex hoc iure. Certe nulla ratio est, cur princeps auferre possit dominium vel ius quaesitum ex tali conventionem iuris civilis, quia in eo laederetur simul lex et ratio naturalis et ius gentium, ut inferius cum Cicerone probabimus.”

exterminated, according to Piñel, because it is inhumane (*inhumana*).<sup>16</sup> In the meantime, princes should be urged to respect private rights as faithfully as possible. They have only limited power. This is the truth that Piñel finds it necessary to investigate and to explain even if the prince has no superior in his territory. Moreover, he thinks that private individuals have a means of effectively protecting their property against usurpation by the prince – at least if the regime has not turned into a tyranny.

### (3) The social nature of man and the do-no-harm principle

The basis of Piñel's diatribe against political absolutism and interference with private property lies in his conception of justice as a kind of do-no-harm principle. This is a principle dictated by natural reason. It is expressed in the legal, the religious, and the philosophical traditions from Classical Antiquity:<sup>17</sup> "Depriving someone of his property or right (*dominium vel ius suum*) clearly is an offence not only against the civil or man-made written law, but also against natural law or the law of nations, and even against the law of God, since harm (*iniuria*) and injustice (*iniustitia*) are inconsistent with each of these bodies of law."

Obviously, Ulpian's definition of justice in D.1.1.1pr fits well into Piñel's conception of justice. In Roman-law terms, justice is the constant and perpetual will to give everybody his right, to do no harm (*neminem laedere*), and to live honestly.<sup>18</sup> Following late medieval jurists such as Baldus and humanists such as François Connan and Guillaume Budé, Piñel repeats that natural reason (*ratio naturalis*) itself dictates that we may do no harm to our neighbours. The text from D.1.1.3 is a positive legal expression of that natural truth. It says that it is nefarious for man to do harm to another man, since nature made us into "relatives" of one another.

In principle, Roman law also contains a prohibition on unjust enrichment. Piñel grants that the prohibition contained in D.12.6.14pr (*ne quis cum aliena iactura locupletetur*) can be seen as an expression of natural reason (*ratio naturalis*). However, true to the humanist spirit, he denies

16 Piñel, *Commentarii* (n 6), ad rubr, part 1, cap 2, num 24, 18: "Infertur tandem omnino reijciendam et exterminandam esse inhumanam illam multorum traditionem, cum principi tribuunt plenissimam vel absolutam potestatem, eam ab ordinaria distinguentes, ut ex illa omnia possit, utque facta mentione talis potestatis nulla exceptio objici valeat."

17 Piñel, *Commentarii* (n 6), ad rubr, part 1, cap 2, num 26, 20: "... satis liquere videtur ... cum alicui dominium vel ius suum aufertur, non tantum ius civile, vel humanum scriptum offendi, sed etiam naturale et gentium, imo et divinum, quibus repugnat iniuria vel iniustitia."

18 D.1.1.1pr-3.

that the Roman jurists themselves could have meant this to be an expression of the Judaeo-Christian prohibition on stealing. To be sure, parallels between Roman law and Christian theology in regard to the principle of unjust enrichment do exist. After all, both normative systems have been inspired by natural reason. Yet Piñel rejects the idea that Roman jurisprudence was influenced directly by divine law.<sup>19</sup>

To Piñel himself, divine law does matter, of course. *Laesio* inflicted by an absolutist prince or by another citizen goes against the Seventh Commandment not to steal. In reality, Piñel does not cite the Seventh Commandment. He merely refers to *ius divinum* in general. The only Scriptural passages he quotes are the so-called Golden Rule: “Do to others, what you would have them do to you, that is the entire Law and Prophets” (Mt 7:12), and the precept to love your neighbour as yourself (Mt 22:37–39). These prescripts would have been part of Catholic culture in general. Unlike his Protestant counterparts, Piñel would not have felt the need to get involved in profound Biblical exegesis. In fact, he claims that he borrowed the references to these New Testament texts from Augustine’s *City of God*.<sup>20</sup>

Contrary to the meagre attention paid to divine law, Piñel is eager to adduce as many authoritative texts as possible from Greek and Roman philosophers to support his views on justice. Aristotle’s argument against tyranny serves as a warning that the more power is concentrated in the hands of the rulers, the more likely it is that political stability will be short-lived, since oligarchy and tyranny are the most unstable forms of government.<sup>21</sup> Through Ambrose he quotes the typically Stoic maxim that man is born not only with the aim of becoming useful to himself, but also to others (*homo non ut sibi ipsi tantum sed et ut aliis prosit natus*).<sup>22</sup> To wrong other people

19 For example, he criticises the ordinary Gloss on D.47.2 (*De furtis*) for interpreting natural law as “divine law” in the Roman text which reads that theft is prohibited as a matter of natural law. According to Piñel, “that interpretation is miles away from the mind of Paul the jurist; in writing this, Paul did not know about the precepts of divine law and sacred Scripture”; cf Piñel, *Commentarii* (n 6), ad rubr, part 1, cap 1, num 21, 7: “Patet errasse glossa in d. l. 1 dum exponit lege naturali, id est, divina. Id enim prorsus a mente iurisconsulti Pauli ibi, qui praecepta divinae legis et sacrae scripturae non cognovit.”

20 Piñel undoubtedly refers to Augustinus, *De civitate Dei* (Ed. CCSL 48) (1955), 19, 14, p 681: “Iam vero quia duo praecipua praecepta, hoc est dilectionem Dei et dilectionem proximi, docet magister Deus, in quibus tria invenit homo quae diligat, Deum, se ipsum et proximum . . .”

21 Aristotle, *Politica* (5th edn, W D Ross) (1957), 5, 12, 1315b11–12, p 187: “καὶ τοὶ πασῶν ὀλιγοχρονιώταται τῶν πολιτειῶν εἰσιν ὀλιγαρχία καὶ τυραννίς”.

22 This appears to be a free adaptation of Ambrose, *De officiis*, 1, 28, 132, in *Saint Ambrose, Les devoirs, Livre 1, Texte établi, traduit et annoté par Maurice Testard* [Collection des Universités de France] (1984) vol 1, 158: “Quo in loco aiunt placuisse stoicis quae in terris gignantur, omnia ad usus hominum creari; homines autem hominum causa esse generatos ut ipsi inter se aliis alii



is to violate nature (*naturam violat, qui alteri nocet*).<sup>23</sup>

As is commonly known, patristic social thought, particularly as expressed in Ambrose's *On duties*, is to a very large extent modelled on Cicero's *On duties*. It is hardly surprising, then, to find that Piñel borrows the greatest part of his social views from the famous Roman orator. Accordingly, Piñel regards as one of the most important principles for living in society the universal prohibition on harming another person out of self-interest (*non liceat sui commodi causa nocere alteri*).<sup>24</sup> The do-no-harm principle pertains to natural law. It imposes itself upon all human beings, princes and Popes included. It can be regarded as the basis of the *laesio*-interdiction in contractual exchange, in particular.

### C. UNHOLY NEW IDEAS:

#### PIÑEL'S CRITICAL INTERPRETATION OF *LAESIO ENORMIS*

##### (1) The concept of *laesio enormis* is not part of classical Roman law

For the majority of the late medieval jurists, the beginning of Piñel's commentary on the *Lex secunda* would have been shocking.<sup>25</sup>

Against the gloss and the opinion of all previous writers I strongly believe that the right grounded on C.4.44.2 was issued for the first time only (*nove*) by Emperors Diocletian and Maximian. Consequently, this remedy was entirely unknown by the jurists (whose *responsa* we find in the Digest). May the true sense of many laws be revealed through this insight.

Centuries of reading Roman law in light of Christian principles, or, better still, of doing legal scholarship in search of Roman legal texts giving authoritative support to Christian principles are suddenly being thought of as

prodesse possint."

23 An allusion to Ambrose, *De officiis* (edn Testard), 3, 4, 24, in *Saint Ambroise, Les devoirs, Livres 2-3, Texte établi, traduit et annoté par Maurice Testard* [Collection des Universités de France] (1992) vol 2, 91: "Hinc ergo colligitur quod homo qui secundum naturae formatus est directionem, ut oboediat sibi, nocere non possit alteri; quod, si qui nocet, naturam violet . . ."

24 E.g. Cicero, *De officiis*, 3, 5, 21 (edn Testard, vol 2) 81: "Detrahare igitur alteri aliquid et hominem hominis incommodo suum commodum augere magis est contra naturam quam mors, quam paupertas, quam dolor, quam cetera quae possunt aut corpori accidere aut rebus externis."

25 Piñel, *Commentarii* (n 6), ad l 2, part 1, cap 1, num 3, 66-67: "Ego contra glossam et omnes hucusque scribes verissimum credo, Diocletianum et Maximianum imperatores, nove hoc ius [C.4.44.2] induxisse, ac proinde iurisconsultis (quorum responsa in libris digestorum habemus) nullatenus hoc remedium cognitum fuisse." Compare his conclusion in lc, num 7, 68: "Nemo igitur iuris vel rationis peritus inauditam nostram sententiam rejiciendam putabit, cum tot iuribus, totque fundamentis probetur, ut sic contra glossam et omnes hucusque scribes maneat, ex constitutione hac Diocletiani novum ius inductum fuisse . . ."



superseded. Highly indebted to the mentality of Renaissance humanism, Piñel looks for nothing but the true meaning (*verus sensus*) of the Roman texts. He wants to understand them in their original context. He wants to highlight the fundamental difference between the pagan worldview of the classical jurists and the Christian *ius commune* as it developed in the later Middle Ages.

The classical jurists ignored the remedy now associated with C.4.44.2. This is what Piñel infers from the absence of even the slightest reference in other imperial constitutions and in the Digest to this remedy or to a concrete determination of the quantity that constitutes *laesio*. If the remedy for lesion had been as crucially important to the pre-Diocletian Romans as it was to the late medieval jurists, then we could have expected a more elaborate treatment of it in the *Corpus Justinianum*, according to Piñel.

Moreover, he interprets D.4.4.16.4 (*in pretio emptionis et venditionis naturaliter licet contrahentibus se circumvenire*) as originally constituting a kind of absolute principle of “freedom of contract”.<sup>26</sup> “These words do not admit of imaginary afterthoughts and external restrictions by doctors who seek to limit them by virtue of C.4.44.2.” The same holds true for D.19.2.22.3 (*in locationibus quoque licet invicem se circumscribere*)<sup>27</sup>: “If we love the truth, we cannot interpret these words as admitting of the violent limitations imposed by the doctors.”

In Piñel’s view, the irrelevance of lesion to original Roman law is obvious from various texts in the Digest. First of all, lesion is not listed as a ground for rescission in *De rescindenda venditione* (D.18.5). Secondly, in obvious cases of lesion the Roman jurists did not provide the *laesus* with a remedy (e.g. D.42.1.15). Thirdly, in his *On duties*, Cicero recounts the story of a sly and wicked vendor called Pythius who tricked Canius.<sup>28</sup> He sold him sterile and absolutely worthless lands by persuading him that these lands were in fact the most fruitful lands. Now Cicero apparently did not think Canius could have had any other remedy to defend himself except for the *actio de dolo*, even though this was a clear instance of lesion beyond moiety.

26 Piñel, *Commentarii* (n 6), ad l 2, part 1, cap 1, num 4, 67: “Quae verba non admittunt commencias subauditiones, extrariasque restrictiones doctorum ea limitantium ex decisione huius l.”

27 Piñel, *Commentarii* (n 6), ad l 2, part 1, cap 1, num 4, 67: “Quae verba (si verum amamus) non admittunt violentam doctorum limitationem.”

28 Cicero, *De officiis* (edn Testard, vol 2), 3, 14, 58–60, 100–102.

## (2) The concept of *dolus re ipsa* is a late medieval invention

Cicero's story of Pythius and Canius leads Piñel to deconstruct yet another mythical notion that was fabricated in the *ius commune* on the basis of D.45.1.36pr: objective deceit (*dolus re ipsa*). Piñel recognises that he is afraid (*vereor*) that many will badly bear the new light of truth (*novam veritatis lucem*) he is about to shed on the matter, blinded as they are by an inveterate misinterpretation.<sup>29</sup> Yet there is no denying a certain feeling of pride and superiority in his voice as he announces his new exegesis. Perhaps this might explain why his pupil, Manuel Soares a Ribeira, felt the need to soften the impious impression his master left. He inserted a gloss on *vereor* in what became the standard edition of Piñel's book. In this gloss, he quoted a couple of verses from Horace's *Letters*, expressing the idea that the elderly do not accept criticism against well-known playwrights, either because they think that the right thing is only what pleases them, or because they do not want to admit that what they learned as young boys was false.<sup>30</sup> In this manner, Soares a Ribeira tries to make clear why Piñel had a legitimate reason to be afraid: people tend to be wary of what is new, because innovation is often detrimental to society.

The upshot of Piñel's argument is that the classical jurists were not concerned with *laesio*, whether big or small, as long as it was not accompanied by *dolus*. In the absence of deceit, they would not consider any deviation from some sort of normal price to be relevant. They had no conception of deceit as something intrinsic to the transaction itself. Only in cases of intentional deceit (*interveniente dolo*) could the quantity of the lesion become relevant. The idea of objective deceit could not possibly have made sense to the classical jurists, since the remedy provided in C.4.44.2 had not yet come into existence.<sup>31</sup> This is a good example of how important the insight of the novelty of the *Lex secunda* is for a correct understanding of the Digest.

The *locus classicus* of the debate on objective deceit was the *lex*: *Si*

29 Piñel, *Commentarii*, ad l 2, part 1, cap 1, num 7, 68: "Vereor tamen ne ex tenebris inveterati erroris plures fortasse novam veritatis lucem aegre sustineant."

30 Horace, *Epistulae*, 2, 1, 79–85, in *Horace, Satires, Epistles, and Ars poetica*, with an English translation by H Rushton Fairclough, [Loeb Classical Library, 194], Cambridge Mass/London, pp 402–404: "Attæ fabula si dubitem, clament periisse pudorem cuncti pene patres, ea cum reprehedere coner; quæ gravis Aesopus, quæ doctus Roscius egit, vel quia nil rectum, nisi quod placuit sibi, dicunt, vel quia turpe putant parere minoribus, et quæ imberbes didicere, senes perdenda fateri."

31 Piñel, *Commentarii* (n 6), ad l 2, part 1, cap 1, num 7, 68: "Inde etiam eleganter colligitur, cur tantum interveniente dolo iurisconsulti distinxerunt circa quantitatem . . . quasi cessante dolo non esset differentia inter magnam vel parvam laesionem."

*quis cum aliter* (D.45.1.36). In the medieval *ius commune* it was interpreted as containing a distinction between two types of deceit: deceit by tricks (*dolus ex machinatione*) and objective deceit (*dolus reipsa*).<sup>32</sup> Lesion beyond moiety was then deemed to be a species of *dolus reipsa*. However, Piñel reads the *lex: si quis cum aliter* in a completely different way. He does not deny that the text is subdivided into two parts that deal with two different types of deceit. Yet sensitive to the procedural nature of Roman law, he differentiates between deceit at the moment of the conclusion of the contract and deceit that only emerges when the contract becomes the subject of a lawsuit:<sup>33</sup>

The true sense of D.45.1.36 is that both parts of it deal with a plaintiff who committed deceit. The first part concerns deceit right from the inception of the agreement (*a principio conventionis*). The second part concerns deceit at the moment of the lawsuit (*tempore iudicii*). For that reason, the defendant is equally granted an *exceptio doli* against the deceitful plaintiff in both cases.

Departing from a metaphysical reading of the Latin word “*res*”, Piñel rightly gives a much more practically significant meaning to it: “lawsuit”. The sentence that was traditionally seen as the foundation of “objective deceit” then simply reads as follows: “the lawsuit itself is affected by deceit” (*ipsa res in se dolum habet*). This new interpretation is illustrated through the following example. Assume that something has been promised or agreed upon in view of a certain reason (*causa*), but that, subsequently, this reason does not come about. There was no deceit at the moment of concluding the contract. Still, the very act of taking the promisor to court would then be deceitful, since the reason that drove the promisor into the contract had not been realised (*causa non secuta*).<sup>34</sup>

32 D.45.1.36: “Si quis, cum aliter eum convenisset obligari, aliter per machinationem obligatus est, erit quidem subtilitati iuris obstrictus, sed doli exceptione uti potest; quia enim per dolum obligatus est, competit ei exceptio. Idem est, et si nullus dolus intercessit stipulantis, sed ipsa res in se dolum habet; cum enim quis petat ex ea stipulatione, hoc ipso dolo facit, quod petit.”

33 Piñel, *Commentarii* (n 6), ad l 2, part 1, cap 1, num 8, 68: “Verus ergo sensus d.l. est, quod in utraque parte eius parte, agens dolo erat: in prima vero, fuerat dolus a principio conventionis, in secunda tempore iudicii. Ideoque pariter doli exceptio adversus agentem datur.”

34 Piñel, *Commentarii* (n 6), ad l 2, part 1, cap 1, num 8, 68–69: “Exemplum autem secundae partis facile colligitur ex l. 1, ff. de conditione sine causa [D.12.7.1], melius vero ex l. 2, § circa, ff. de doli exceptione [D.44.4.2.3], prout quando aliquid promissum vel conventum fuit ob certam causam postea deficientem. Tunc enim in contractu nulla fraus intervenit. Dolose autem ex eo ageretur, causa non secuta.”

### (3) Imitating and emulating the French humanists

Arias Piñel does not hide the contempt he feels for the *communis opinio*. He deplores that even recent French humanist authors such as Pierre Loriot and Pierre Coustau (Costalius) made the mistake of reading the *lex: si quis cum aliter* and the *lex: secunda* together.<sup>35</sup> Because they did not properly investigate the historical development of C.4.44.2, they ignored the fact that Emperors Diocletian and Maximian created a new remedy, which was non-existent in classical jurisprudential literature. Therefore, they also made a futile effort reading *laesio enormis* into D.45.1.36.

As critical as a humanist jurist can be, Piñel concludes that traditional authority failed (*hallucinati sunt*).<sup>36</sup> Originally, Roman law did not care about lesion or some kind of “objective deceit”. Only if a case of unequal exchange also involved duress or fraud did the classical jurists grant a remedy. Against this background, Piñel feels disappointed by Charles Du Moulin’s harsh assessment of C.4.44.2. How could such a learned man berate Diocletian and Maximian so severely for not giving relief to a lesioned party unless the lesion was beyond moiety?<sup>37</sup> In Piñel’s view, it is to the credit of the

35 P Coustau, *Adversaria ex Pandectis Iustiniani* (1554), part 1, ad D.4.4.16, 79: “Et ex par. Idem Pomponius vulgo omnibus in ore est, et iure civili, et pontificio permissum esse contrahentibus se invicem decipere, quod tamen a bono viro alienum est. Plane si deceptio ex dolo veniat, de dolo actio erit, et contractus rescindetur. Idem si dolo in reipsa est, nempe quia deceptio ultra dimidiam iusti pretii intercessit, tunc enim revocari potest [l. si quis cum aliter]. Quod autem hic ad finem [par. nunc videndum] datur potestas quibusdam iudicibus restitutiones dandi, quibusdam admittitur, hodie non est in usu. Iure enim Codicis etiam inferioribus magistratibus hoc competit; est, quod Bartolus hic probat.” P Loriot, *Tractatus de pactis*, in *De iuris apicibus tractatus octo, et de iuris arte tractatus viginti* (1555), axiom 91, col 465. For biographical information on Coustau, see V Hayaert, *Mens emblematica et humanisme juridique, Le cas du Pegma cum narrationibus philosophicis de Pierre Coustau* (1555), [Travaux d’Humanisme et Renaissance, 438] (2008), 27–48. For biographical details about Loriot, see J-L Thireau, sv Loriot, Pierre, in P Arabeyre, J-L Halpérin and J Krynen (eds), *Dictionnaire historique des juristes français, XIIe-XXe siècle* (2007) 518.

36 Piñel, *Commentarii* (n 6), ad l 2, part 1, cap 1, num 8, 68: “Ego verius puto doctores cum glossa ad verbos iurisconsulti hallucinatos fuisse, nihilque minus iurisconsultum in l. [D.45.1.36] ea sensisse quam de remedio huius l. [C.4.44.2] quod evincitur ex eodem Ulpiano et aliis iurisconsultis in locis supra citatis, dum aperte et indistincte tradunt, laesis in precio nullatenus succurri, nec dolum ex sola laesione censi.”

37 C du Moulin, *Tractatus commerciorum et usurarum reddituumque pecunia constitutorum et monetarum* (1558), num 172, 152–153: “Hic Diocletiano et Maximiano ethnicis visum fuit, satis esse licentiam illam per excessum vel defectum a iusta et vera aequalitate declinandi ad dimidium iusti pretii vel aestimationis, id est ipsius aequalitatis, cohibere, ne ulterius vagari posset. Sed certe haec cohibitio valde disproportionata est, utpote quae proportionem aequalitatis dimidio totius fraudari concedat, et sic inaequalitatem admittit duplae ad subduplam . . . quod est valde excessivum et a iusta aequalitate et naturali iustitia nimis remotum . . . Hinc durities dictae legis secundae multum placet et opportuna est viris tyrannicis et pleonecticis, qui sciunt et possunt sibi vigilare et cavere ne unquam decipiantur, ut numquam sibi metuant . . .”

Emperors to have granted relief on the basis of C.4.44.2 in the first place. Rather than being criticised, they should be praised for their sense of equity.<sup>38</sup> Incidentally, it might be remarked that Du Moulin is often seen as a forerunner of liberal commercial ethics. He nevertheless held on to the principles of equality in exchange and just pricing as tightly as the early modern scholastics.<sup>39</sup>

Another issue on which Piñel disagrees with Du Moulin concerns the interpretation of the famous maxim that it is naturally permitted for contracting parties to try to outwit each other (D.4.4.16.4). True to his humanistic approach, Piñel first of all rejects the medieval jurists' interpretation according to which cheating in sale and lease was allowed as long as the quantity of the harm was moderate. In both the secular and ecclesiastical courts, a remedy was given to the *laesus*, but only if the harm was considerable, that is more than half of the just price (*ultra dimidiam*). Yet, again, this conventional interpretation could not satisfy Piñel's insatiable desire for the truth.

If we want to know the true meaning of D.4.4.16.4 and, by extension, of D.19.2.22.3, we need to free them from the intellectual world in which the medieval jurists lived, according to Piñel. From the classical jurists' perspective, there is no difference between considerable and lesser *laesio*. Moreover, the general terms in which paragraph *Idem Pomponius* is phrased exclude any distinction between lesion beyond and lesion below moiety.<sup>40</sup>

38 Piñel, *Commentarii* (n 6), ad l 2, part 1, cap 1, num 22, 72–73: “Ex praedictis infertur contra Molinaeum de commerciis, num. 172 qui hanc legem duram et a tyrannis conditam exclamat, arguens, quod maximam iniquitatem permittat non succurrendo laesis, nisi ultra dimidiam iusti precii. Sed miror virum doctum | et ingeniosum inique et incaute in hanc l. invecutum, debuit enim potius ex humanitate et aequitate eam laudare, cum antea nullum remedium laesis dabatur, cessante dolo vel metu vel aetatis privilegio, ut supra probavimus, vel debuit saltem cum omnibus agnoscere, ante hanc legem non fuisse aliam quae laesis magis succurreret, ut sic non magis in hanc quam in alias exclamaret.” Piñel then goes on to reprehend Du Moulin for having unrightfully criticised the theologians' understanding of *laesio enormis*.

39 C du Moulin, *Commentarii in Parisienses consuetudines* (1597) par 33, gl 1 in verb. *Droict de relief*, num 46, 438: “... quando de laesione et rescissione agitur, iustum pretium ad tantam pecuniam aestimatur, quantum res iuste valet, non quantum repertum fuit aut reperiri posset ... Et debet esse aequalitas, et eadem commensuratio inter emptorem et venditorem et eadem iuris summetria.”

40 Piñel, *Commentarii* (n 6) ad l 2, part 1, cap 1, num 32, 74–75: “Quae verba [sc. in pretio emptionis et venditionis naturaliter licere contrahentibus se circumvenire] accipiunt glossa et omnes ibi, glossa et omnes hic, glossa et omnes in cap. cum dilectus, et noviores infra citandi, ut tantum referantur ad laesionem citra dimidiam. | Ego autem verissimum puto iurisconsultos in illis verbis indistincte de omni laesione sentire, nec aliquid referre ad mentem iurisconsultorum an laesio modica an maxima sit; tum ex generalitate verborum, quae non admittunt communem restrictionem, tum quia eo tempore incognita erat differentia magnae vel modicae laesionis, de qua agit haec lex, ut supra late probavimus.”

No matter whether it is big or small, for the Romans any lesion is irrelevant in regard to the validity of a sale contract. In short, traditional opinion has been misguided by not making the effort to read the different texts from the Digest and the Code in their historical context.

The new interpretation of D.4.4.16.4 suggested by Piñel rests on a reading of the paragraph in its broader textual context. Title 4 of the fourth book of the Digest concerns minors. The *lex: in causae cognitione*, in particular, deals with the question whether a minor can be granted other remedies than the extraordinary remedy of restitution (*restitutio in integrum*).<sup>41</sup> According to Piñel, the upshot of the argumentation is that minors cannot appeal to the special remedy of restitution unless the contract they entered into is still valid. Hence, the aim of paragraph *Idem Pomponius* is to determine whether cheating (*circumventio*) invalidates a sale contract or not. If it does, then a minor is granted the ordinary remedies and not restitution.

According to Piñel, what is at stake in D.4.4.16.4 is the availability of the remedy of *restitutio in integrum* for minors (*principaliter agit de concedenda vel neganda restitutione*).<sup>42</sup> Since cheating does not invalidate the contract, the conclusion to paragraph *Idem Pomponius* should be that a minor is granted the remedy of restitution in a contract where buyer and seller have tried to outwit each other. So D.4.4.16.4 is actually about a procedural advantage for minors. The purpose of the argument was not to establish a universal rule of law – rigorous law – that allows buyers and sellers to outwit each other.<sup>43</sup>

Piñel disagrees with Du Moulin in interpreting the meaning of the “natural” permission to cheat. Du Moulin held that it was “naturally permitted” for parties to outwit each other, because they were both willing to turn a

41 D.4.4 (*De minoribus vigintiquinque annis*).16pr: “In causae cognitione etiam hoc versabitur, num forte alia actio possit competere citra in integrum restitutionem. Nam si communi auxilio et mero iure munitus sit, non debet ei tribui extraordinarium auxilium, utputa cum pupillo contractum est sine tutoris auctoritate, nec locupletiores factus est.”

42 Piñel, *Commentarii* (n 6), ad l 2, part 1, cap 1, num 33, 75: “Vides igitur, quod dixi contra omnes, quo ad mentem iurisconsulti ibi, dum principaliter agit de concedenda vel neganda restitutione, nullam esse differentiam inter magnam vel modicam laesionem.”

43 Piñel, *Commentarii* (n 6), ad l 2, part 1, cap 1, num 34, 75: “Imo si subtilius mens iurisconsulti expendatur, colliges contra glossam et omnes (quod fortasse mirabile videbitur) verba illa, *licere contrahentibus in precio se circumvenire*, principaliter ibi prolata fuisse in favorem et beneficium laesi, nempe minoris, ut scilicet restitutionem habere posset, quia is est scopus iurisconsulti ibi. Non enim pertinebat ad rubricam nec ad ea quae iurisconsultus ibi tractabat, tradere regulam, vel rigorem illum iuris, ut liceat contrahentibus, in precio se circumvenire. Plane igitur mens iurisconsulti eiusque praecipua decisio id petit, ut non obstante qualibet laesione in precio, contractus valeat, et inde sequatur, minorem restituendum fore.”

blind eye to each other's cheating.<sup>44</sup> Piñel rejects this analysis as unrealistic. After profound reflection, Piñel thinks the only correct understanding of "naturally" goes back to the gloss and Thomas Aquinas. Piñel insists that it is dangerous in this context to confound the philosophers' notion of natural law and its juridical meaning. Natural law in the sense of natural equity or the common social bond of love between all men cannot possibly lie behind paragraph *Idem Pomponius*. In this context, the only appropriate meaning of "naturally" is "according to the *ius gentium*".

On account of experience, Piñel argues, people from all nations reasoned that lesion should be permitted (*permittenda*) lest commerce be continually disturbed by too strict an observance of contractual equilibrium.<sup>45</sup> The security of transactions and the stability of the legal system must prevail. Consequently, what may be wrong on an individual basis may become permitted on the level of society as a whole.<sup>46</sup> Piñel draws inspiration from the views of humanists such as François Le Douaren on prescriptive acquisition (*usucapio*). A similar concern for social stability (*tranquillitas reipublicae*) allowed individuals to acquire goods in spite of their bad faith. Interestingly, to support this view, Manuel Soares a Ribeira adduces Seneca's typically Stoic belief that the Gods care more about the whole than about the individual.<sup>47</sup> Piñel himself referred to Cicero's statement that the salvation of the people is the supreme law.<sup>48</sup> In conclusion,<sup>49</sup>

44 Du Moulin, *Tractatus commerciorum* (n 37), num 182, 161: "Nota quod d. l. 2 non est facta, nisi pro veris et naturalibus contractibus commutativis, in quibus tacito quodam naturali sensu partes sibiipsis modicam laesionem mutuo condonare et indulgere videntur."

45 Piñel, *Commentarii* (n 6), ad l 2, part 1, cap 1, num 39, 76: "Ego aliter ea verba explicanda putabam post rem vero satis consideratam, ita credo sensisse gl. In d. § idem Pomponius ad quem nemo advertit. Exponit enim gl. *naturaliter*, id est *iure gentium*. Intellego autem, ut secundum exactissimam illam priorem aequitatem naturalem non dicatur licere contrahentibus invicem se in precio nec in alia re circumvenire. Nam secundum eam naturae normam omnes homines cognati et mutua dilectionis lege continere dicuntur . . . Exponitur ergo, *naturaliter*, id est *iure gentium*, quia humana ratione gentiumque et populorum iudicio compertum est, permittendam fuisse eam laesionem in pretio, ne ex nimia aequalitatis observatione commercia turbarentur. Nulla enim conventio securitatem praestaret, nunquam litium finis esset, si ob laesionem in pretio conventa revocarentur."

46 Piñel, *Commentarii* (n 6), ad l 2, part 1, cap 1, num 40, 77: "Unde quo ad universos et pro tranquillitate reipublicae potest favorable censer, quod singulis separatim (sic) durum videbitur."

47 Seneca, *De divina providentia*, 3, 1, in *Seneca, Moral Essays*, with an English translation by J W Basore, [Loeb Classical Library, 214], Cambridge Mass/London 1963<sup>3</sup> [=1928], vol 1, 14: "... pro universis, quorum maior diis cura quam singulorum est . . .".

48 Cicero, *De legibus*, 3, 3, 8, in *Cicéron, Traité des lois*, Texte établi et traduit par G de Plinval, [Collection des Universités de France], (1968<sup>2</sup>) [=1959], 85: "Salus populi suprema lex esto."

49 Piñel, *Commentarii* (n 6), ad l 2, part. 1, cap 1, num 40, 77: "*Naturaliter* igitur *licere* dixerunt iurisconsulti ex permissione humani iuris seu gentium, secundum quod ad quietem reipublicae magis consentaneum visum est, eam laesionem in precio remittere, et ideo ea non obstante,



The jurists used the expression “naturally allowed” by reason of a permission by human law, i.e. the law of nations, to the extent that it is more conducive to the stability of the republic to condone lesion in the price. As a result, the contract remains valid regardless of the lesion, so that then, in particular, it became necessary to grant restitution as a remedy to minors. That is what Pomponius’ fragment is all about.

#### D. CONCLUDING REMARKS

The humanist flavour of Arias Piñel’s legal thought expressed itself through his constant emphasis upon the difference between the original sense of the Roman texts and the meaning that was read into them in subsequent ages. The outrage which Piñel felt at the abuse of the Digest translated itself into scathing remarks about the historical nonsense of the medieval jurists, which sometimes persisted even in contemporary humanist jurisprudence. His philological nature made Piñel fundamentally unhappy with the anachronistic use of Roman legal texts. However, one should not infer from this that Piñel did not share the scholastic jurists’ commitment to adapt legal thinking to the needs of their own, essentially Christian society. Also, his slightly condescending attitude towards the medieval *ius commune* did not prevent him from citing scholastic authorities such as Thomas Aquinas and Baldus along with the great classical poets and philosophers from Antiquity.

Ironically, Piñel could be considered as a humanist jurist who took the Christian heritage from the middle ages more seriously than his scholastic counterparts. For example, his treatment of the renunciability of the remedy grounded on the *Lex secunda* was deeply influenced by the Christian concern to protect the weak and to promote equity (*aequitas*). While the medieval jurists had recognised that contracting parties had a right to renounce the remedy by virtue of C.4.44.2, Piñel was highly critical of all of those renunciation clauses. Perhaps he was influenced here by the work of Antonio Gómez, a professor of Roman law at the University of Salamanca. Gómez had argued that even the combination of a specific renunciation clause and a donation clause could not deprive the *laesus* of his right to seek support from the *Lex secunda*. He reasoned that the same facility (*facilitas*) with which such a party could become the victim of lesion would be at the basis of his renunciation or donation clause.<sup>50</sup> Piñel took this reasoning a step further.

semper contractus valet, et consequenter restitutio tunc specialiter minoribus necessaria fuit, ad id enim tendit iurisconsultus in d. § ut supra.”

50 A Gómez, *Commentarii variaeque resolutions* (1572), tom 2, cap 2, num 26, 227: “Item adde, quod talis deceptus poterit agere remedio praedictae legis secundae, etiamsi dixerit, quod donat

According to him, even if the lesioned party knew in advance that he was going to suffer lesion, this knowledge did not deprive him of the remedy provided by C. 4,44,2. Contrary to the common, medieval opinion, Piñel argued that knowledge does not take away that remedy.

One of the main motivations behind Piñel's attack on the *communis opinio* lay not in his general criticism of the medieval legal tradition, but rather in his loyalty to Christian morality.<sup>51</sup> "The contrary opinion is more true and more decent to Christians."<sup>52</sup> Christian morality urges Piñel to take the possibility of abuse of necessity (*necessitas*) seriously. Knowledge of the true price should not be a ground to relinquish the remedy offered by C.4.44.2, because equity (*aequitas*) lies at the very heart of this constitution.<sup>53</sup> Typical of his practical approach to the interpretation of ancient texts, Piñel also hailed the procedural advantages of this view. In court, the burden of proof now shifted from the *laesus* to the *laedens*. The victim of *laesio enormis* would no longer need to maintain his ignorance, let alone prove it.<sup>54</sup> In other words, Arias Piñel was a jurist with a taste for philological criticism and humanist erudition, but he also showed himself to be sensible to the needs of legal practice, certainly in a Christian society. Conscience requires that equity and good faith be observed down to the last detail.<sup>55</sup> In case of conflict, even Piñel's profoundly humanist sense of the pure letter of Roman law must bend before the spirit of equity.

illud quod plus valeret et insuper renunciavit remedio praedictae legis secundae, quia illa verba non debent referri ad magnum pretium, sed ad modicum . . . Item etiam, quia eadem facilitate qua inducitur ad vendendum, inducitur etiam ad ponendum illam clausulam vel aliam similem . . ."

51 For a more profound discussion, see Decock, *Theologians and contract law* (n 1) 581–588.

52 Piñel, *Commentarii* (n 6), ad l 2, part 1, cap 2, num 11, 80: "Sed ea scribentium turba nos non deterruit, quin contrarium verius, et Christianis hominibus decentius putemus."

53 Piñel, *Commentarii* (n 6) ad l 2, part 1, cap 2, num 12, 81: "Suadetur etiam ex aequitate, quae militat etiam in eo, qui sciebat verum pretium, potuitque ex necessitate vel alia causa moveri. Iuvatur etiam, quia iura saepe succurrunt hominibus dissipantibus bona sua."

54 Piñel, *Commentarii* (n 6), ad l 2, part 1, cap 2, num 16, 81–82: "Infertur similiter necessario, ad praxim et libellum in materia huius legis non esse necessarium articulos vel positiones formare, quod laesio per ignorantiam contigerit . . . Ex quo etiam resultat non solum in processu non oportere probare ignorantiam . . . sed nec eam allegare . . ."

55 Piñel, *Commentarii* (n 6), ad l 2, part 1, cap 1, num 35, 75: "Quae receptior et magis pia traditio satis comprobatur ex iurisconsulto in d. l. iure succursum, 7, § finali, ff. de iure dotali iuncta declaratione superius tradita. Ubi enim exactissime bona fides et aequitas requiritur, prout ibi in causa dotis etiam minor laesio emendari iubetur, quod magis viget in foro conscientiae."